IN THE

Supreme Court of the United States

October Term, 1953

No. 223

DELTA AIR LINES, INC., *Petitioner*,

v.

ARTHUR E. SUMMERFIELD, *Postmaster General of the United States*, and THE UNITED STATES OF AMERICA, on behalf of the Postmaster General, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 68-76) is not yet reported. The opinion of the Civil Aeronautics Board (R. 51-60) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered o May 4, 1953 (R. 77). Petitions for a Writ of Certiora were filed July 31, 1953, by the Civil Aeronautics Boar (No. 222) and by the Petitioner (No. 223). The Actin Solicitor General subsequently filed a Memorandum i which he stated that he did not oppose the granting of th writ. The writ was granted October 12, 1953. The juris diction of this Court is invoked under 28 U.S.C. 1254 (1 and 49 U.S.C. 646 (f).

QUESTIONS PRESENTED

1. Whether, when the domestic and international opera tions of the same air carrier have been classified as sepa rate rate-making units, the Board is empowered by th Civil Aeronautics Act to apply any of the revenues derive from the carrier's domestic services during a past three year period of final and closed air mail rates in reductio of such carrier's requirements for compensation under th Act on its international division, in a proceeding where ai mail rates for such international division are being fixe retroactively for the same period.

2. Whether, if, contrary to Petitioner's contention, th answer to Question 1 is in the affirmative, the Board ma exercise its discretion as to whether or not, for reasons o public interest, any such possible application of revenue derived from the carrier's domestic division shall be mad in whole or in part, or not at all, in fixing air mail rates fo the carrier's international division.

3. Whether the decision below by the Court of Appeal effects a recapture of earnings of the air carrier unde closed air mail rates in its domestic division contrary to th construction of the mail rate provisions of the Civil Aero nautics Act laid down by the United States Supreme Cour in *Transcontinental & Western Air, Inc.* v. *Civil Aeronau tics Board,* 336 U.S. 601 (1949).

4. Whether the Board, in fixing mail rates for an air carrier may give weight to rate-fixing policies desirable in the public interest for the air transportation industry as a whole and, therefore, for the particular air carrier (for which mail rates are being fixed) as an integral part of such industry.

STATUTES INVOLVED

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended, [1] which will be referred to as the Act, are set forth in the Appendix hereto.

STATEMENT

Chicago and Southern Air Lines, Inc. (C&S) [2] during the period relevant to this case conducted domestic air transport operations over routes extending between Chicago and Detroit, on the one hand, and Houston and New Orleans, on the other, and international air transport operations over routes extending between the two last mentioned cities and Caracas, Venezuela via Havana and Kingston. The certificates of public convenience and necessity for both operations authorize the transportation of mail, persons, and property.

This case concerns the fair and reasonable rates for the transportation of mail in the international division of C&S fixed by the Board on October 18, 1951, for the period January 1, 1948 to December 15, 1950; and involves the question of whether earnings of the carrier experienced in its separate domestic division during that period under final air mail rates fixed by the Board on July 28, 1948, and unchallenged during such period must, as a matter of law, be

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[1] Act of June 23, 1938, c. 601, 52 Stat. 977, as amended, 49 U.S.C. 401, et seq.

[2] Chicago and Southern Air Lines, Inc., has since merged with Delta Air Lines, Inc. (Delta) by statutory corporate merger, Delta being the surviving corporation. Delta was substituted as the intervenor below subsequent to the decision of the Court of Appeals (R. 78).

used to reduce the carrier's mail pay requirements in its international division.

Pursuant to Section 406(b) of the Act, the Board is empowered to "fix different rates for . . . different classes of service". In accordance with its unvarying practice in cases where a single air carrier conducts substantial international operations in addition to domestic operations, the Board classified the international and domestic operations of C&S into two separate rate-making divisions. Some of its related policy reasons as expressed in the opinions of the Board below were: (a) "many considerations which enter into the fixing of an international rate are different from those entering into the establishment of a domestic rate" (R. 20); (b) the desirability of achieving maximum incentive, by replacing a carrier's temporary air mail rates on a "cost-plus" basis with permanent final rates, is such that it is undesirable to delay putting a carrier on final rates for its domestic system pending the completion of a proceeding designed to set final rates for the international system (R. 19, 20); (c) it is desirable "to maintain the comparative status between those domestic operators which have foreign routes as against those which do not have foreign routes", not only in order to encourage incentive by creating "class rates" for groups of domestic carriers within which each carrier must compete in securing revenue and in controlling costs, but also because of the administrative desirability of preserving "a comparative status between carriers" so that the Board can "analyze the operations . . . within a class in the light of the results achieved by others within the same class" which is a rate-making procedure proven "to be the most satisfactory and practicable available to the Board" (R. 54-55); and (d) the fact that "if the domestic air transport system can be

kept financially sound, the public must ultimately benefit" (R. 54).[3]

Accordingly, the Board in different proceedings, concluded at different times, set final and different mail pay rates for C&S's domestic and international divisions.

The domestic case was completed first. In July of 1948 the Board fixed final "need" mail rates[4] effective January 1, 1948, for the air carrier operations of C&S over its do-

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[3] On this important consideration the Board said (R. 54):

> "If an offset policy were adopted, the almost invariable result would be that, as in the instant case, the profits from a carrier's domestic operation would be used to sustain any international operations it might have. Recognizing this likelihood, we hesitate to burden the more robust segment of the industry with the obligations of the economically weaker part. For if the domestic air transport system can be kept financially sound, the public must ultimately benefit, putting aside any consideration of the obvious advantage of reduced rates of mail compensation. Thus, we anticipate that if the carriers' earning position continues strong, reductions in the domestic fare level will be possible, thereby giving impetus to the further development of the industry. In addition, with improved earnings, the domestic operators should be able to benefit the public and themselves with more modern aircraft, and with improved methods affording safer and more efficient operations. We cannot escape the thought that if we allow international operations to be carried on the back of domestic operations, we shall be subjecting the latter to an unjustifiable strain."

[4] The Board fixes two types of rates of compensation for the transportation of mail under Section 406 of the Act (*infra*, Appendix). One is called a "service rate". It is subsidy-free and is fixed in terms of mail actually transported, such as 45 cents per ton-mile for the Group I class of subsidy-free domestic air carriers (American Airlines, Inc., Eastern Air Lines, Inc., Trans-World Airlines, Inc., and United Air Lines, Inc., herein sometimes referred to as "American", "Eastern", "TWA", and "United", respectively) and 53 cents per ton-mile for the Group II class of subsidy-free domestic air carriers (Braniff Airways, Inc., Capital Airlines, Inc., Delta Air Lines, Inc., National Airlines, Inc., Northwest Airlines, Inc., and Western Air Lines, Inc., herein sometimes referred to as "Braniff", "Capital", "Delta", "National", "Northwest", and "Western", respectively). The service rate includes allowances for costs allocable to the mail service and for a rate of return on a portion of investment allocable thereto. C.A.B. Administrative Separation of Subsidy from Total Mail Payments to Domestic Carriers, p. 8 (September, 1951). The other type is the "need rate". In order to meet the "need" standard set forth in Section 406(b), this type of rate includes compensation greater than would be included in a service rate. Customarily a "need rate" is fixed in terms of a formula geared to aircraft miles flown.

mestic air routes. This decision of the Board is reported in *Chicago and Southern Air Lines, Inc., Mail Rates*, 9 C.A.B. 786. In that proceeding the Board estimated the revenues which would be received by C&S from traffic carried (other than mail) in the domestic division and the expenses of conducting its operations therein. The difference between such revenues and expenses is known as "break-even need". After making appropriate allocations of total investment between the domestic and international divisions, it determined the exact amount of investment for rate-making purposes which C&S would require to conduct its domestic operations and upon which a fair rate of return (profit element) was allowed.

The Board then proceeded to establish "need" mail rates for C&S's domestic division which would cover C&S's "break-even need", as determined by the Board in the light of the objectives of the Act, and to allow for a fair return on investment allocated to that division. At 9 C.A.B. 786, 810-811, it stated that it was adopting a sliding-scale formula for the payment of these mail rates related to the percentage of passenger seats occupied to the seats available (load factor), whereby the estimated effective mail rate per revenue plane mile flown would be gradually reduced as the load factor increased.[4a]

[4a] Thus the estimated effective mail rate per revenue plane mile flown, at a load factor of 60%, was 26¢. An increase in load factor to 70% or 80% would cause the rate to drop to 17¢ or 8¢ respectively. 9 C.A.B. 786, 811. The Board stated that it was adopting the sliding-scale type formula for "the same reasons that we relied upon in applying the sliding-scale formula" in *Continental A. L., Mail Rates*, 8 C.A.B. 825 (1947). There the Board had pointed out that: ". . . . A sliding-scale rate formula should serve in the instant case to minimize the possibility of frequent rate revisions attributable to uncertainties in predicting Continental's passenger traffic. The public interest will also be served by providing the carrier with an effective incentive for maximum development of its routes consistent with economical and efficient management, since Continental will earn proportionately greater profits with the increasing development of its traffic potential, while at the same time the burden on the Government through need mail payments will be progressively reduced." 8 C.A.B. 825, 840.

From the excerpt from the Board's decision set forth in the footnote below [5] one further very important fact may be ascertained. On the basis of the facts then before it, the Board accepted the estimate that C&S would achieve a passenger load factor of 60.09 percent. The Board also estimated that such a load factor would yield a rate of return after taxes of 7.4 percent. But the Board did *not* intend this as a fixed rate of return to be built into C&S's mail rate. As can be readily ascertainable from the table in-

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[5] ". . . The operating income per revenue plane mile before Federal income taxes, and the rate of return on recognized investment after income taxes at 38 percent, for various load factors indicated, are presented below. .

Revenue passenger load factor	Operating income before income tax, per revenue mile	Percent return on recognized investment after income taxes at 38%
Percent	Cents	Percent
50	—3.85	(1)
55	3.87	3.6
60	7.90	7.3
65	11.03	10.2
70	14.16	13.1

[1] The loss of 3.85 cents per revenue mile is equivalent to a loss of 5.7 percent on recognized investment, without allowance for Federal tax credits.

"From the above tabulation, it appears that C&S under honest, economical, and efficient management may be expected to earn a rate of return, over an annual period, of 7.3 percent, with a 60 percent annual revenue passenger load factor. At the forecast passenger load factor of 60.09 percent, the estimated rate of return after taxes is 7.4 percent. It should be noted that with an average annual passenger load factor of 60 percent, the average base mail rate will amount to 29.8 cents per airplane mile, but the average effective mail rate will amount to approximately 26 cents per revenue plane mile flown.

"An extra cushion against unforeseen developments will be provided to the extent that C&S succeeds in developing additional revenues from express, freight, and incidental sources above the level forecast for the future period. Similarly, any economies which the carrier's management succeeds in accomplishing through effective cost controls or improved operating procedures and techniques, which serve to avert or mitigate anticipated increases in prices and to decrease operating costs below the unit cost of 116.6 cents per revenue plane mile estimated herein, will inure to the carrier in the form of higher earnings." *Chicago and Southern Air Lines, Inc., Mail Rates,* 9 C.A.B. 786, 812 (1948).

cluded in the Board's decision as quoted in footnote 5, the Board anticipated and intended that C&S's rate of return would vary with the load factor it experienced. Furthermore, regardless of the passenger load factor experienced by C&S, the Board anticipated and intended that any "economies" which the Company's management effected would "inure to the carrier in the form of higher earnings", and, accordingly, increase the rate of return. Thus the Board found air mail rates to be fair and reasonable for C&S under which the rates of return on the investment allocated to the domestic division would vary, up or down, depending upon the passenger load factor and/or cost level experienced by C&S. The Postmaster General was a party to the proceeding and did not make any objection to the rates fixed.

Throughout the years 1948, 1949, and 1950 the mail rates established by the Board for C&S's domestic division remained unchallenged by the Postmaster General or by anyone else. As required of all air carriers, C&S filed quarterly reports with the Board which were available to the public and which showed the results of operation under such rates. Pursuant to Section 406(a) of the Act (*infra*, Appendix), the Postmaster General, at any time during this period, could have filed a petition with the Board seeking a revision of the rate and the Board would have been required to hold a hearing and render a decision thereon.

Three years after its final order fixing the rates for C&S's domestic operations and in a proceeding separate from that in which the final rates for domestic operations had been fixed, the Board determined the final "need" mail rates for the air transport operations of C&S in its international division. In its Statement of Tentative Findings and Conclusions issued on May 18, 1951 (R. 6-48) and Order to Show Cause of the same date (R. 49, 50), it proposed to fix a mail rate for C&S's international division retroactively for the period from November 1, 1946 to December 15, 1950, and a different "need" rate prospectively from December

16, 1950. It is that part of the mail rates set in this proceeding for the international division during the retroactive period January 1, 1948 through December 15, 1950, which is now before the Court.

The Postmaster General filed objections to the Board's Tentative Findings and Conclusions issued in the international division rate proceeding. He now claimed that the earnings which C&S had achieved during the period of 1948 through 1950, which reflected revenues from commercial services and compensation pursuant to the final mail rates set in 1948 for its domestic division, included "excess" earnings in the amount of approximately $654,000; and that this amount was "other revenue" which under Section 406(b) of the Act, must, as a matter of law, be applied in reduction of the amount of the "need" of the air carrier for the same period determined by the Board to be required for C&S's international division in the 1951 proceeding.[5a] The Postmaster General, overlooking the fact, as noted in the portion of the Board's decision in the domestic rate case quoted in footnote 5 above, that the Board had set variable rates of return on the estimated investment allocated to C&S's domestic division depending upon the passenger load factor and/or cost level experienced by C&S, focused entirely upon the sentence that "at the forecast passenger load factor of 60.09 percent, the estimated rate of return after taxes is 7.4 percent." Claiming that this rate of return had a special legal significance over and above any of the other variable rates of return which the Board anticipated and intended C&S to receive depending upon the passenger load factor and/or cost level it achieved, the Postmaster General asserted that the maximum earnings to which C&S was entitled was this 7.4 percent figure applied to the actual investment allocated to the domestic division during

[5a] See pp. 4-5 of the Answer of Postmaster General to CAB Order to Show Cause, No. E-5385. By stipulation filed with this Court, citations to the unprinted portions of the record below may be included in the briefs.

the years 1948 through 1950. As noted above, the 7.4 percent return was one of many possible rates of return which the Board anticipated C&S might receive if (a) it achieved the forecasted 60.09 percent passenger load factor, (b) it maintained the exact cost level which the Board estimated it would experience, on the facts then before it, and did not achieve any of the "economies" which the Board specifically stated might be achieved, with a consequent increase in earnings, and (c) it maintained the exact level of investment estimated by the Board, on the facts then before it, which it had allocated to, and allowed for, the domestic division. As a matter of fact, as a result of economies effected and of accounting adjustments (largely in depreciation accounts, R. 65) the reports of C&S to the Board indicated that C&S had averaged a rate of return throughout the years 1948, 1949, and 1950 of 12.51% on its actual investment allocated to the domestic division. It is the volume of earnings reflecting the difference between an application of one of the many rates of return estimated by the Board in the 1948 domestic rate case as achievable by C&S, namely 7.4 percent, to actual investment allocated to the domestic division, and the 12.51% return thereon actually experienced, amounting to approximately $654,000, which the Postmaster General now claims as "excessive" and must be applied in reduction against the "need" determined by the Board to be required for C&S's international operations in the proceeding now before this Court.

There were three positions taken regarding this issue in the following procedural steps before the Board, and subsequently before the Court of Appeals.

The Postmaster General continued in his assertion that, in determining the "need" of C&S in 1951 in the international division rate case for the period 1948 through 1950, the Board *must*, as a matter of law, look back to the actual experience of C&S during this same period during which it was operating under a final mail rate order established in 1948 for the domestic division, and apply in reduction of

the international "need" what the Postmaster General claimed as "excess" profits on the domestic division as computed above.

C&S asserted that, as a matter of law, the Board could *not* reduce the international "need" determined by the Board in the 1951 proceeding by an amount representing a portion of its earnings on the domestic division, on the grounds that "the C&S domestic rate has been finalized and closed since 1948" and "having remained unchallenged for the entire duration of their existence, the Board is not legally empowered to revise such rates retroactively or to disturb past earnings arising thereunder."[6] The Board's staff, represented by Bureau Counsel, also questioned the Board's power to make the reduction requested by the Postmaster General (R. 53).

An alternative position, taken by both C&S and Bureau Counsel, was that the Board could refuse to reduce the international "need" by C&S's earnings on its domestic division as a valid exercise of its discretionary authority granted under Section 406(b) of the Act.

The Board in its opinion accompanying its final order affirming the action proposed in its Statement of Tentative Findings and Conclusions, rejected the Postmaster General's contention that, as a matter of law, it *must* make the reduction requested by the Postmaster General. It did not decide the question of whether, as a matter of law, it could *not* make the reduction requested by the Postmaster General, but rather held that it could decline to take such action "if there are sound reasons for not doing so as a matter of economic policy." (R. 53-55)

Following a denial of the Postmaster General's Petition for Reconsideration (R. 62), the Postmaster General filed a Petition for Judicial Review with the court below of the orders of the Board fixing the mail pay of C&S on its in-

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[6] Answer of C&S to Postmaster General's Petition for Reconsideration, p. 2, dated November 26, 1951, filed in the record in this proceeding before the Board.

ternational division (R. 2-6). The court below held, Judge Prettyman dissenting, that $654,000. derived from the domestic operations constituted "all other revenue of the air carrier" which the Board must, under Section 406(b) of the Act, apply in reduction against the "need" of the carrier's international division as determined by the Board. Judge Prettyman would have affirmed the Board's decision on the ground that when Congress gave the Board power to fix different air mail rates for different classes of service, it meant for the Board to make separate calculations for such different classes and not to take into consideration factors unrelated to the service for which the rate is being fixed. (R. 75-76) But, he stated, that if that position should be in error, the soundness of a complete separation of the foreign from the domestic division persuaded him that the Board could act as it did. (R. 76)

SPECIFICATION OF ERRORS

The Court of Appeals erred:

(1) In holding that the Civil Aeronautics Board, in fixing air mail rates for the international division of C&S as a separate class of service and as a separate ratemaking unit from its domestic division, was empowered by Section 406 of the Civil Aeronautics Act to apply any of the carrier's earnings in the domestic division in reduction of the carrier's "need" for mail compensation in its international division;

(2) In holding that as a matter of law the Board is authorized, and required, to effect a recapture of past earnings in the domestic division of C&S, in which mail rates which had long been closed and with respect to which no proceeding was pending, by applying such earnings in reduction of the carrier's "need" for mail compensation in its international division in a subsequent proceeding in which the only issue was the fixing of mail rates for the international division separately classified as such for ratemaking purposes;

(3) In holding that the direction of Section 406 of the Act to the effect that the Board, in fixing air mail rates for a particular class of services of an air carrier, shall take into consideration the "need" of the carrier for certain developmental purposes, includes a requirement that the Board go outside such class of service and ascertain whether there are any other revenues of the air carrier arising in some other class of service which could possibly be so applied in reduction of such "need";

(4) In assuming, and in effect holding, that Chicago and Southern had received excess earnings on its domestic services;

(5) In holding, if the Court of Appeals was not in error in its holding specified in (1) above, that Section 406 of the Civil Aeronautics Act does not vest discretion in the Board to determine whether it should apply in reduction against the carrier's "need" for air mail compensation on its international division any portion of other revenues of the carrier derived from its domestic division in which a final and unchallenged mail rate had been fixed;

(6) In holding that the Board's determination was unlawful insofar as it gave effect, for reasons of public interest, to rate-making policies of importance to the air transport industry as a whole in fixing the rates of a single carrier which is an integral part of that industry; and

(7) In setting aside the order of the Board.

SUMMARY OF ARGUMENT

I

The application of the past earnings of the domestic division of C&S, reflecting commercial revenue and compensation under final and unchallenged mail rates, in reduction of the "need" of C&S for mail compensation of its international division is not authorized by Section 406(b) of the Act. While that section, in stating the standard to govern

the Board in fixing mail rates, provides that the Board shall take into consideration, among other factors, the "need of each such air carrier for compensation for the transportation of mail sufficient . . . together with all other revenue of the air carrier" to enable the carrier to meet the statutory objectives, these references to the "need" and revenues of the "air carrier" are qualified by other language in the Section. This other language is an express provision that in fixing mail rates, "the [Board] . . . may fix different rates for . . . different classes of service." This latter authority necessarily embraces, consistently with well-recognized concepts of public utility rate-making, the power of the Board to establish separate territorial units of the carrier for rate-making purposes and to fix rates for a unit smaller than the carrier's whole operation. The meaning of the statutory references to "need" and revenues of the "air carrier" must be construed so as to give effect to the Board's authority to establish separate rate-making units.

The Board's action in 1948 in fixing final mail rates for C&S's domestic division as a separate rate-making unit was a lawful and unchallenged exercise of its powers under Section 406(b); and, therefore, the "need" of C&S which Section 406(b) directs be taken into consideration by the Board in the present international division proceeding must be construed to refer only to the international division of C&S for which rates are now being fixed.

A contrary construction of Section 406(b) would impute to Congress an intention to abandon the established principles of public utility rate-making: (1) that the rate fixing agency has power to fix rates for territorial units less than a utility's entire operations and (2) that final and unchallenged rates cannot be retroactively reviewed or revised. This Court in *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board*, 336 U. S. 601 (1949) has expressly held that the Board is not authorized to fix mail rates retroactively to a period in which a final rate previously fixed was in effect and unchallenged.

A construction of the Act which would permit the application of past earnings of the domestic division of C&S, reflecting commercial revenues and compensation under final and unchallenged mail rates, in reduction of its "need" for mail compensation in its international division would be contrary to the basic objectives expressed in the Act in that such construction: (1)would create a cost-plus system of rate-making for those carriers which operate both domestic and international services, (2) would jeopardize the established overall national air policy of the United States with respect to international air transportation by creating economic conditions which might well result in the operation of United States international air routes by a single carrier, a policy heretofore rejected as undesirable to the national interest, (3) would impair the financial stability of air carriers by destroying the finality of earnings realized under final mail rates and (4) would hamper the development of domestic air services by making it impossible for air carriers engaged in both domestic and international services to compete effectively in domestic services with air carriers engaged exclusively in domestic services.

II

If, contrary to Petitioner's contentions as summarized above under I, Section 406(b) is to be construed as requiring the Board to "take into consideration . . . the need . . ." of the carrier as a whole whenever it fixes mail rates, the Board's decision in the case before this Court is a valid exercise of this discretionary authority.

The Board in its decision did not find that the actual earnings of C&S on its domestic services, reflecting commercial revenues and compensation under the final mail rates fixed in 1948, were in excess of fair and reasonable rates for that service or in excess of the carrier's need for that service. In its 1948 decision, the Board had fixed a sliding-scale of mail rates variable according to the actual load factors (ratio of passenger seats occupied to passenger

seats available) which C&S might develop and, as the Board expressly recognized in that decision, the rates of return on investment which C&S might realize under those mail rates could vary from 3.6% at a 55% load factor to 13.1% at a 70% load factor. The Board also pointed out that the benefits of economies and improvements in operations would "inure to the carrier in the form of higher earnings". The reported earnings of C&S during the period in question were 12.5% on its investment allocated to the domestic division. The Board has not determined that any part of this 12.5% return represents legally excess earnings.

In its decision fixing mail rates in the international division now before this Court the Board did not ignore the domestic earnings of C&S. On the contrary, the Board took note of the fact that C&S had earned on its domestic division a return of 12.5% on investment. It then considered in detail the question whether any portion of those earnings should be applied in reduction of the "need" which would otherwise be found to exist in relation to the international services. The Board concluded that considerations of public interest which are set out in detail in the Board's opinions, and which are clearly within the contemplation of the objectives of the Act, required that the mail rates for the international services should be fixed without any reduction in such rates to reflect any part of the domestic earnings. The court below did not find that the considerations of public interest which the Board recites in its decision as controlling its determination of its treatment of the domestic earnings were arbitrary or capricious or outside of the statutory objectives. Clearly, therefore, the Board's action is an entirely proper and authorized exercise of the broad discretion granted expressly to the Board by the Act in the fixing of mail rates necessary to meet the statutory objectives.

ARGUMENT

I. WHEN THE BOARD, UNDER AUTHORITY OF THE ACT, SEPARATELY CLASSIFIED THE DOMESTIC AND INTERNATIONAL OPERATIONS OF C&S AS SEPARATE RATE-MAKING UNITS, IT WAS NO LONGER EMPOWERED BY THE ACT, WHEN FIXING AIR MAIL RATES IN THE INTERNATIONAL DIVISION IN 1951, TO APPLY IN REDUCTION OF THE "NEED" OF C&S FOR THE 1948-1950 PERIOD IN ITS INTERNATIONAL DIVISION ANY PORTION OF THE EARNINGS WHICH WERE REALIZED DURING THE SAME PERIOD IN THE DOMESTIC DIVISION UNDER FINAL AND UNCHALLENGED AIR MAIL RATES FIXED IN 1948 IN A SEPARATE PROCEEDING FOR THE DOMESTIC DIVISION.

Introduction—It has been the consistent practice of the Board in all cases of air carriers engaged both in domestic and in substantial international operations to establish separate rate-making divisions for these two different classes of service. The Board has specific power to do this under the provisions of the first sentence of Section 406(b) which authorizes it to fix "different rates for . . . different classes of service". The Board, having thus established such separate rate-making divisions in such cases has consistently proceeded to fix rates for each division in a separate proceeding. This has had the effect of treating the words "air carrier" in the second sentence of Section 406(b) as if those words meant the division of the air carrier for which rates are being fixed.[8]

The Postmaster General (and the court below) come forward with a position never urged before and claim that

[8] Section 406(a) of the Act (*infra*, Appendix) empowers and directs the Board to fix and determine, after notice and hearing, fair and reasonable rates of compensation for the transportation of mail by aircraft. The first sentence of Section 406(b) provides that "In fixing and determining fair and reasonable rates of compensation . . . the [Board] . . . may fix different rates for . . . *different classes of service* . . ." (Emphasis supplied.) The second sentence provides that in determining the rate in each case the Board shall take into consideration, among other factors, the "*need of each such air carrier* for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with *all other revenue of the air carrier*, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense." (Emphasis supplied.)

the words "air carrier" as used in the phrases of the second sentence of Section 406(b), "need of each such air carrier" and "all other revenue of the air carrier", should be construed literally to mean the air carrier as a whole, including all divisions.

Petitioner submits that complete reliance upon the literal import of the words "air carrier" as used in the second sentence of Section 406(b) to establish Congressional intent in regard to the problem at bar, is in error. As this Court has declared, if the literal import of words used in a statute is not consistent with "the policy of legislation as a whole" or will lead to "absurd results", they will be modified.[9]

The controlling guide to Congressional intent under these circumstances are the canons of statutory construction to the effect that a part of the statute must be construed with reference to the leading idea or purpose of the whole act so as to induce an harmonious whole,[10] and that if there is doubt in one section of the act, another may be used to expand or restrict its meaning.[11]

With this in mind, Petitioner develops the following arguments in the subsections below in support of its Point I as stated above:

First, Petitioner asserts that Congressional intent in granting the Board power "to fix different rates for . . . different classes of service" in the first sentence of Section 406(b) must be considered in determining the content of the words "air carrier" in the second sentence of Section 406(b);

Second, Petitioner asserts that Congressional intent must be much more clearly shown than it is in Section 406(b) before those words can be construed to break with the established principles of rate-making existing at the time the

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[9] *United States* v. *American Trucking Associations*, 310 U.S. 534, 543 (1940).

[10] *In re Public National Bank of New York*, 278 U.S. 101 (1928); 2 Sutherland, *Statutory Construction* (3rd ed. 1943), p. 336.

[11] *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U.S. 381 (1939).

Act was passed, and subsequently thereto, wherein a rate-making body had the power to fix rates on the basis of a territorial unit less than company-wide operations, and that a final and unchallenged mail rate could not be retroactively reviewed or revised. Particular reliance in this connection is placed upon the decision of this Court in *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board*, 336 U.S. 601 (1949) where it was decided that the Board did not have authority to fix a new mail rate for an air carrier, retroactive during a period in which a final rate previously fixed by the Board was in effect and unchallenged because, among other reasons, Congress did not intend to break from established traditions of rate-making;

Third, Petitioner asserts that the intent of the Act, as revealed in its expressly stated purposes and as the Act has been construed by this Court, is in direct contradiction to the construction of Section 406(b) urged by Postmaster General and adopted by the court below; and

Fourth, Petitioner asserts that, contrary to the contention of the Postmaster General that the Board's prior administration of the Act supports his contention, the Board has consistently prescribed that a final and unchallenged mail rate had integrity and could not be retroactively revised without jeopardizing many of the basic purposes of the Act, and that this construction of the Act by the agency entrusted with its administration, is entitled to great weight.

A. If, in fixing the air-mail rates in the international division of C&S, the Board must also determine the "need" of the carrier as a whole, the express authorization to "fix different rates for . . . different classes of service" of an air carrier becomes meaningless, contrary to well recognized principles of statutory construction.

Petitioner submits that the first sentence of Section 406(b) where the Board is given authority to fix different air mail rates for "different classes of service" of an air carrier has an important bearing upon the meaning of the second sentence. It submits that the words "air carrier"

in the second sentence must be construed to mean a division of an air carrier in a situation where the Board has utilized its power under the first sentence and has established a division in which it has set a final rate. This construction will render the statute an harmonious whole.

This point is immediately evident by focusing upon the Congressional directive in the second sentence of Section 406(b) that the Board is to "take into consideration, among other factors", in fixing and determining mail rates the "need" of the air carrier "for compensation for the transportation of mail sufficient," first, "to insure" the performance of the mail service, and second, "together with all other revenue of the air carrier, to enable" it, under "honest, economical, and efficient management, to maintain and continue" the developmental purposes, including national defense purposes, of "air transportation."[12]

If the Postmaster General and the court below are correct, this determination of "need" must be made in every case for the air carrier as a whole.[13] Under this

[12] In this connection Petitioner submits that the court below misconstrued the second sentence of Section 406(b) when it said (R. 72) that the "duty of the Board in fixing 'fair and reasonable rates of compensation' under Section 406(b)" is "in each case to 'take into consideration, among other factors . . . all other revenue of the air carrier.'" Petitioner submits, however, that the statute *cannot* be so read grammatically. The Board is directed to "take into consideration" the "*need*" of the carrier with its dual purposes, and not merely "all other revenue" which is a very different legal concept from "need". This misconstruction of Section 406(b) which automatically suggests "offset" to the mind, coupled with a misunderstanding of the Board's intent in the domestic mail rate case to set a variable rate of return, rather than a specific rate of return from which a "corpus" of "excess" earnings could be automatically determined, may account in a large degree for the error of the court below.

[13] The determination of "need" is usually a complex process, emerging after exhaustive consideration of what services performed and to be performed should be underwritten as being required by the commerce, national defense, or Postal Service of the United States (see, e.g., R. 24; and *Braniff Airways, Inc., Mail Rates*, 1 C.A.A. 353, 359 (1939)), of which services and equipment are justified under the economical and efficient management standard (see, e.g., *Pioneer Air Lines, Inc., Mail Rate*, C.A.B. Order No. E-7225, March 13, 1953, p. 4), of what costs should be allowed or disallowed, of what investment should be recognized as constituting the rate base, of what profit element should be allowed, and so on.

emise the determination of "need" by the Board in 48 for C&S's domestic division alone, upon which based the carrier's domestic mail rates (and which as not objected to by the Postmaster General), was error because the "need" there determined was not for e carrier as a whole. According to them, whatever was one in the domestic division proceeding in 1948 was of no fect because, the Postmaster General and the court below sist, that when the Board determined "need" for the ternational division in 1951 for the 1948-1950 period, it as in error in not determining need for the carrier as a hole at that time which, of course, would constitute a re-etermination of the "need" for the domestic division since at division is part of the whole.

By such a construction of Section 406(b) the action of ne Board in 1948 in setting final mail rates for C&S's omestic division is given no final effect. At most it can e considered as setting temporary rates, subject to subse-uent adjustment in a later rate proceeding.

The result of such a construction is to write off the power hich Congress granted the Board in the first sentence of ection 406(b) to fix rates (*not* limited to fixing "tempo-ary" rates subject to complete revision at subsequent imes) for different classes of service. The position of the Postmaster General, to which the court below raised no bjection, that it does not question the Board's authority o fix rates separately for different operating divisions of he air carrier, while, at the same time, insisting that 'need" be determined for the carrier as a whole (R. 71) s simply incomprehensible in its inconsistency because the tatute cannot be construed in two opposite directions at nce.

The provisions in the first and second sentences of Sec-ion 406(b) harmonize naturally. As Judge Prettyman in is dissent below indicated, the concept of different rates or different services has a definite bearing upon "take

into consideration" in the following sentence (R. 75-76). He then said,

> ". . . When the Board is fixing a particular rate it should take into consideration factors related to that rate, and none other. Such is plain sense, a sort of rule of relevancy."

This position would cause the words "air carrier" in the second sentence to be construed, as Petitioner submits they must be construed, to mean that when the Board commits itself to fixing rates for a division (i.e., class of service), such words mean that division of the air carrier; and that they mean the international division of C&S under the facts of this case.[14]

Such a construction would prevent rendering meaningless the words "classes of service" and would make the entire Section fit together properly.

Before turning to other evidence of Congressional intent supporting this conclusion, a brief answer should be given to the argument that authority to set a final mail rate in one division of an air carrier independent of others impairs the control of the Board over grants of subsidy contrary to the intent of Congress. This argument is without substance.

One of the most comprehensive reporting systems in the field of regulatory agencies has been established for air carriers by the Board.[15] The air carriers file exhaustive reports of their traffic and financial experience at frequent intervals which are open to the public. The Board and its

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[14] It might be noted also that the words "air carrier" as used in the second sentence must be construed as having a different meaning than their literal meaning in another connection to which surely there would be no objection. If the Board exercises its power under the first sentence of Section 406(b) to set a rate for a "class of air carriers", then the term "air carrier" as used in the second sentence must be construed as in the plural, "air carriers", in order to make sense of the Section. The construction Petitioner advances in a case where the Board exercises its power to set a rate for a "class of services", reaches a similar result.

[15] Sec. 407, 49 U.S.C. 487; Civil Aeronautics Board, Economic Regulations, Part 241, 14 CFR 770.

staff, and the Postmaster General, are at all times informed by this means as to whether or not it appears that a division should have its "need" redetermined.

Thus the Board can, and frequently does, institute a new rate proceeding under Section 406(a) of the Act on its own initiative to reduce the existing final mail rate. The Postmaster General, too, has the authority to file a petition requesting a reduction in the mail rate and could have taken this action at any time during the 1948 to 1950 period in which the final domestic mail rate of C&S was in effect.[16]

B. Well-established principles of rate-making in existence at the time the Act was passed confirm a construction of Section 406(b) of the Act which authorizes the Board to fix air mail rates for a territorial unit less than the carrier's whole operation and which prevents recapturing earnings under a closed rate.

In determining the validity or invalidity of the construction which the Postmaster General and the court below wish to give to Section 406(b) of the Act, which would destroy the finality of the rate established by the Board for C&S's domestic division, attention must be focused upon the established traditions of rate-making existing at the time the Act was passed and the question of whether Con-

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[16] Actually, the Board on October 1, 1951, reopened the domestic division rates of C&S (CAB Order No. E-5747) and reduced the domestic rates (See *Chicago and Southern Air Lines, Inc., Domestic Operations, Statement of Tentative Findings and Conclusions*, CAB Order No. E-5869, November 15, 1951; and CAB Order No. E-5956, December 19, 1951, making rates final).

It should also be noted that the power of the Board to protect the public interest against excessive subsidy payments exists under any set of circumstances including those not present in this proceeding. As illustrations, if a carrier is on a final "need" rate in one division involving an element of subsidy, and is on a final "service" rate in another division, and it is felt that the earnings under the service rate are excessive, the Board under the power of Section 406(a) can reclassify both divisions into a company-wide rate, which would have the affect of reducing subsidy through a lower average rate, or the Board could consider benefitting the public by reducing the passenger and property rates on the domestic division which would have the affect of reducing earnings.

gress intended in the Civil Aeronautics Act to make a radical break with such traditions.

In the only other proceeding to come before this Court involving the mail rate provisions of the Civil Aeronautics Act, this Court gave a meaning to statutory language in dispute contrary to its literal import upon the ground, among others, that to construe the language literally would be to ascribe a Congressional intention "to break with these traditions of rate-making." [17]

The authorization in the first sentence of Section 406(b) which provides that the Board "may fix different rates for . . . different classes of service" of an air carrier is Congressional reflection of the universally accepted tradition in rate-making, in existence prior to the passage of the Civil Aeronautics Act as well as subsequently thereto, whereby public utility regulatory agencies are vested with the authority to fix rates on a territorial unit embracing less than company-wide operations. Often a rate on less than company-wide unit has been required on the basis of the governing statute, [18] but more frequently the determina-

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[17] In *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board*, 336 U.S. 601 (1949) this Court was called upon to construe the language in Section 406(a) of the Act (*infra*, Appendix) which empowers the Board to fix and determine the fair and reasonable rate of compensation for the transportation of mail by aircraft and "to make such rates effective from such date as it shall determine to be proper . . ." The Court held that a rate could not be made effective prior to the commencement of the rate-making proceeding even though the literal reading of the general phrase "make such rates effective from such date as . . . . [the Board] shall determine to be proper" would not appear to so limit the Board. After noting that the "language of Section 406(a) . . . reads like a typical public utility rate-making authority . . .", the Court stated that "the rates of carriers and other utilities fixed by public authorities, while usually prospective, are sometimes made retroactive to the date of the commencement of the rate-making proceeding . . ." but "so far as we are aware, they have never been made retroactive to an earlier date." The Court concluded that "the language of the Act does not suggest that Congress intended to break with these traditions of rate-making." 336 U.S. 601, 604, 605.

[18] *Wabash Valley Electric Co.* v. *Singleton et al.*, 1 F. Supp. 106 (D.C. S.D. Ind. 1932), aff'd. *sub nom Wabash Valley Electric Co.* v. *Young*, 287 U.S. 488 (1933).

tion of the proper unit for rate-making has either been specifically committed to administrative discretion by statute,[19] or, in the absence of such express statutory authorization considered a matter for administrative discretion.[20] A broad expression of those principles was given by this Court in the *Wabash Case:*[21]

> "Normally, the unit for rate making purposes, we may assume, would be the entire interconnected operating property of a utility used and useful for the convenience of the public in the territory served, without regard to particular groups of consumers or local subdivisions. But conditions may be such as to require or permit the fixing of a smaller unit . . ."

Such was the rate-making tradition at the time the Civil Aeronautics Act was adopted which is reflected in the provisions of Section 406(b) of the Act authorizing the Board "to fix different rates for . . . different classes of service . . .".

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[19] In Re *Northwestern Bell Telephone Co.*, 164 Minn. 279, 204 N. W. 873 (1925); Wis. Stat. (1929), Section 196.03 (2) which provides that "For rate-making purposes the Commission may consider two or more municipalities as a regional unit where the same public utility serves said municipalities, if in its opinion the public interest so requres." See Baird, *Should the Rate Making Unit be Fixed by Statute,* 1 U. Chi. L. Rev. 451 (1934).

[20] In *American Toll Bridge Co.* v. *Railroad Commission of California,* 307 U.S. 486 (1939) the commission refused to include in a proceeding to fix rates for a certain toll bridge an investigation of the tolls of another bridge owned by the same company. The company protested. The Court held at p. 494 that:

> "In the first instance, at least, determination of the proper unit for rate making was for the commission. The Antioch bridge is not used or useful to render any service covered by the Carquinez tolls; appellant's duty to operate either bridge is independent of its obligation to operate the other. The record discloses no basis on which it reasonably may be held that by limiting the investigation to the Carquinez tolls the commission abused its discretion, . . ."

Cf. *Gilchrist* v. *Interborough Rapid Transit Co.*, 279 U.S. 159, 211 (1929); *Florida Power & Light Co.* v. *City of Miami*, 98 F. 2d 180, 184 (C.C.A. 5th 1938); *International Ry. Co.* v. *Prendergast*, 1 F. Supp. 623, 626 (D.C. W.D. N.Y. 1932).

[21] *Wabash Valley Electric Co.* v. *Young*, 287 U.S. 488, 497 (1933).

Contemporaneous with the rate-making tradition just discussed wherein a rate-making body may set a rate based upon a unit less than company-wide operations, is the tradition that a rate looks to the future and, as such, when final and unchallenged, is not subject to revision with respect to completed transactions. This principle is established by numerous decisions of this Court. [22]

That this fundamental tenet of public utility rate-making was carried over into the Civil Aeronautics Act has been *specifically* held by this Court in *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board,* 336 U.S. 601 (1949). There it was decided that the Board did not have authority to fix a new mail rate for an air carrier, retroactive during a period in which a final rate previously fixed by the Board was in effect and unchallenged by the initiation of a rate proceeding. At 336 U.S. 601, 607 the Court said:

> ". . . a construction *which would make it possible to revise rates retroactively* to any point of time would

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[22] *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370 (1932); *Georgia Railway and Power Co.* v. *Railroad Commission*, 262 U.S. 625 (1923); *Board of Public Utility Commissioners* v. *New York Telephone Co.*, 271 U.S. 23 (1926); *United States* v. *New York Central R. Co.*, 279 U.S. 73 (1929). It might also be noted that at the time the Civil Aeronautics Act was passed Congress had before it, in the "recapture provisions" of the Transportation Act of 1920, 41 Stat. 456, 489-91 (1920) adding Sec. 15A, pars. (5) through (18) to Part I of the Interstate Commerce Act, a specific scheme for recapturing excessive earnings which could have been, but was not, incorporated into the Civil Aeronautics Act. Under the "recapture provisions" of the Transportation Act individual railroads which earned more than a fair return under uniform rates set for all railroads or groups of railroads were to hold any amount in excess of such fair return as trustee for the United States and this sum was distributed one-half to a reserve fund to be maintained by the carrier and one-half to a general railroad revolving fund to be maintained by the Interstate Commerce Commission. These provisions were repealed by the 1933 amendment to Sec. 15a, 48 Stat. 220 (1933), 49 U.S.C.A. Sec. 15a (Supp. 1953), upon the recommendation of the Commission. Among the reasons given by the Commission for repeal of the provisions was the fact that they encouraged "extravagant expenditures by the more prosperous companies when times are good" and that they hung "like a cloud over the credit of many companies when times are bad." *Fifteen Per Cent Case*, 178 I.C.C. 539, 581 (1931).

be a real innovation which should have a more solid basis than our predelictions. We cannot but feel that if the rate-making power were to be put to such a novel use, the purpose would have been made clear. *It is too unprecedented a departure from the conventions of rate-making to rest on mere inference.*" (Emphasis supplied)

Summarizing, therefore, Petitioner submits the following: (1) The Postmaster General has admitted that the Board has the authority "to fix different rates for . . . different classes of service" (R. 72). This authority is confirmatory of a long recognized principle of rate-making in existence at the time the Act was passed that rate-making bodies may fix rates on a territorial unit less than company-wide operations; (2) this Court has declared, on many occasions, both before and after the passage of the Act, that an unchallenged final rate has integrity and cannot be retroactively revised; and (3) these two firmly established tenets of public utility law were in existence at the time the Act was passed, and Congress was undoubtedly aware of them. Accordingly, in the absence of any specifically expressed intent to chart a new course, entirely contradictory to this tradition, it must be assumed that Congress did *not* intend that the Board would have power to recoup now what the Postmaster General asserts were "excess" earnings under a final and unchallenged mail rate for C&S's domestic division.[23]

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[23] It cannot be argued that the integrity of a rate is somehow diminished because the unit upon which it is based comprises a territorial unit that is something less than company-wide. Such a rule would render completely meaningless the power to fix rates on the basis of smaller units which has been specifically recognized by this Court as part of the rate-making tradition. (See *Wabash and American Toll Bridge Co.* cases cited in footnotes 18 and 20, above.) Thus, assume that an electric company serves 20 communities and in the course of time final rates are set on a municipal basis for each of these communities. Unless each of these final rates has integrity, it would mean that every time the citizens of one community sought a decrease in their particular rate, or the company sought an increase, revision of each of the other rates could be brought into question. Such action would,

C. A CONSTRUCTION OF SECTION 406(b) OF THE ACT WHICH WOULD REQUIRE THE BOARD, IN FIXING MAIL RATES IN A PROPERLY CLASSIFIED INTERNATIONAL RATE-MAKING DIVISION, TO DETERMINE "NEED" FOR THE CARRIER DURING A PAST PERIOD IN ITS DOMESTIC DIVISION (WHERE RATES HAD BEEN FINAL AND UNCHALLENGED) AND, THEREUPON, TO CONSIDER REDUCING OR INCREASING THE "NEED" OF THE INTERNATIONAL DIVISION FOR THAT PERIOD, IS CONTRARY TO THE INTENT OF THE ACT AS REVEALED IN THE EXPRESSLY STATED PURPOSES OF THE ACT AND AS CONSTRUED BY THIS COURT.

1. The finality of previously established final rates would be destroyed and a cost-plus basis of rate-making would result.

If the system-wide "need" of an air carrier must be determined as a part of the rate-making process each time a rate-making division proceeding is before the Board, it means that where mail rates are being fixed for a period in the past, any other division which was supposedly on a final rate will have to have its "need" redetermined (whether a net profit or a net loss results) and reflected in the system-wide "need" of the carrier. Such supposedly final rate will not in fact have been final. Not until the last division rate of a carrier is closed will any rate in reality be final. This clearly is a cost-plus system of rate-making.[24] In the experience of the Board the international

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of course, constitute a revision of the entire rate schedule which would make the power to set individual final rates in the first place meaningless. "It is not the law that the commission may not act upon one rate, or the schedule at one exchange, without at the same time acting upon all or any other rates within the state." *Logan City* v. *Public Utilities Com.*, 77 Utah 442, 449, 296 Pac. 1006, 1009 (1931). See also, *In Re Northwestern Bell Telephone Co.*, 164 Minn. 279, 204 N. W. 873 (1925), where the court held the Commission could change the rate in one municipality, without readjusting all rates of the company within the state.

[24] The Board has stated its view of the cost-plus system in *Pennsylvania Central Airlines Corp., Motions*, 8 C.A.B. 685, 697 (1947), aff'd. *sub nom Transcontinental and Western Air, Inc.* v. *Civil Aeronautics Board*, 336 U.S. 601 (1949), as follows:

"Contrariwise the suggestion of the parties to this case is that we assume the responsibility of making up losses incurred over a period of

division rate cases are more difficult and require much more extended periods of time before decision than in the case of domestic divisions (R. 20). If, therefore, every time an international division rate for a past period is being fixed the system-wide "need" of the carrier for the same period must be determined, the advantage in many cases of final domestic rates at an early date disappears and the whole system goes on a cost-plus basis for that period.[25]

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time during which management either did not believe the rate to be an unreasonable one or, if it held such a position, did not see fit to inform us of that fact. On its face the suggestion asks us substantially to put all so-called efficient managements on a cost-plus basis. This would obviously be a reversal of past policies of rate fixing for it would have a natural corollary—the corollary that was freely admitted in this case—that earnings of air carriers in excess of a fair and reasonable rate would be subject to recapture. Such a policy would tend to sap management of those very incentives that in a private economy are essential if we would strive for efficiency."

[25] The Board has emphasized this cost-plus point again recently in *Delta Air Lines, Inc., Mail Rates, Latin American Operations*, C.A.B. Order No. E-7738, Statement of Provisional Findings and Conclusions, adopted September 21, 1953, at p. 14, as follows:

". . . Mail rate proceedings are lengthy and complex. Fixing rates in separate proceedings for the two divisions as separate units gives the carrier the incentive to maximum efficiency in at least one division until the rate for the other division is reached and closed. And, since the Board may at any time reopen the rate for either division, there is little danger of excess subsidy mail pay. On the contrary, to adopt a policy which would, in effect, preclude a final rate status for separate divisions of carriers such as Delta, would, by remitting the carrier to a cost-plus basis until all divisions were closed, inevitably result in fixing cost-plus rates for substantial periods of time. This would be unsound as a matter of policy since subsidy support would be likely to increase due to the lack of a full incentive.[26]

"[26] See also *Transcontinental and Western Air, Inc.* v. *C.A.B.*, 336 U.S. 601 (1949)".

Even though rates are being determined for a rate-making division primarily for the future, there is always a substantial period of time between the originating date of the proceeding and the final rate-fixing order. If the system-wide determination of "need" were required, cost-plus methods of rate fixing would have to be adopted to some appreciable extent and the incentive to do well on closed rates would be impaired.

Furthermore, if, as a matter of law, the application of all domestic earnings over some minimum rate of return is (as the court below held) required in reduction of the "need" of the international division, it would be a breach of the Board's duty to fail to reopen any final international division rate as frequently and as often as it appeared that such domestic earnings might become available. In other words, the rewards for financial progress domestically would have to be snatched away so promptly to further finance the international division as to make the effort to improve in the domestic division of questionable value. In addition, almost perpetual rate-making periods could well result.

All approaches under the decision of the majority below lead in the direction of the cost-plus system. The incentive to do well on final rates, a condition which is in the public interest (R. 21), particularly in the domestic division, would be impaired if not destroyed. This Court has stated that the cost-plus system of regulation "would not harmonize with the apparent design of the Act." (*Transcontinental and Western Air, Inc.*, v. *Civil Aeronautics Board*, 336 U.S. 601, 606 (1949)). This is a compelling reason to construe Section 406(b) so as to give a rate-making division of a carrier the integrity and independence which will permit rate-making with finality therein at the earliest possible time.

2. The profits of the stronger domestic services of carriers operating both domestic and international services would be applied to financing the international air services and this would jeopardize the national air policy of the United States and defeat a basic intent of Congress.

a. THE HISTORY OF THE DEVELOPMENT OF OUR NATIONAL AIR POLICY, AND THE REJECTION OF THE "CHOSEN INSTRUMENT" AS RELATED TO THE OBJECTIVES OF THE ACT.

As shown by the Declaration of Policy in Section 2 of the Act,[26] among the chief aims of the Congress was the

[26] *Infra*, Appendix.

development of an air transportation system "properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense"; the regulation of air transportation in such manner as to foster sound economic conditions therein; and the use of competition to the extent necessary to assure the sound development of such a system.

Domestically, full control over the expansion and development of the air transportation system was given to the Board.[27] But internationally there was a different distribution of power. The President was given control of the route structure;[28] but the function of supplying financial support when and as necessary was vested in both fields with the Board in Section 406 of the Act.

With respect to one paramount issue the President had the unanimous recommendation of all agencies directly interested in our air transportation system. That related to the question of whether the United States should adopt the so-called "chosen instrument" policy of having only one United States air carrier operating in the field of international operations. Prior to World War II a single United States air carrier system, Pan American World Airways (Pan American)[29] operated this country's entire system of international air services (other than trans-

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[27] Control over routes comes from Section 401 of the Act, 52 Stat. 987, 49 U.S.C. 481; and control over financial support comes from Section 406 of the Act, *infra*, Appendix.

[28] Sections 401 of the Act, 52 Stat. 987, 49 U.S.C. 481 and Section 801 of the Act, 52 Stat. 1014, 49 U.S.C. 601, as construed by this Court in *Chicago and Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948). The Board carries out the President's decision by issuing the appropriate order carrying that decision into effect. In the exercise of the international route expansion and development function the President has, with the advice of the Board and broadly speaking, in accordance therewith, built for the nation a large and expanding route system of international operations. (See *infra*, n. 32).

[29] This system is regarded as including Pan American-Grace Airways, Inc., (Panagra), 50% of the stock of which is owned by Pan American.

border operations into Canada). During that War, contracts made by the military establishment with United States air carriers resulted in extensive world-wide operations by some who had theretofore operated exclusively in domestic service. As the War closed, questions of national air policy stood for attention and resolution. Should the "chosen instrument" policy be adopted? If not, what other operators should be placed in the field? Considerations of national defense, foreign relations, foreign and domestic commerce, the Postal Service, and of other matters were involved.

As a result of exhaustive high level consideration given to the matter, the "chosen instrument" policy was rejected. The Board recently summarized the situation with respect to our national air policy and the resulting participation by domestic carriers in the international field, as follows:[30]

> "This policy reflects economic realities if the various carriers operating both domestic and international services are to be expected to continue to operate their international services. It may be noted here that it is not through happenstance that, with the exception of Pan American and Panagra, all United States international air transportation service is rendered by carriers which also operate domestic divisions. Rather, this is the result of a long and arduous policy development participated in by all branches of the Government. Having adopted the policy that the objectives of the Act, the national interest, and the public convenience and necessity would best be served by a system of regulated competition in international air transportation[22] in contrast to the socalled 'chosen instrument', similar considerations have moved the Government to adopt the policy of certificating domestic carriers to perform international services. Thus, in the *North Atlantic Route* case[23] the Board emphasized the experience of the domestic operators, their existing organizations

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30 Delta Air Lines, Inc., *Mail Rates, Latin American Operations*, CAB Order No. E-7738, Statement of Provisional Findings and Conclusions, September 21, 1953, at pp. 10-11.

of trained personnel, and their ability to promote and develop the international service through their domestic systems, in deciding that the public convenience and necessity would best be served by certificating domestic carriers to operate transatlantic routes. This policy was approved by the President and was implemented in later route cases in which Braniff and C&S were certificated to Latin America, and Northwest across the Pacific. And, as indicated above, the international services of these carriers have been regarded as separate rate-making units for which separate final mail rates have been established."

"[22] American Export Airlines, Transatlantic Service, 2 C.A.B. 16 1940)."

"[23] Northeast Airlines, *et al., North Atlantic Route Case,* 6 C.A.B. 319 (1945)."

Substantial international air services have been assigned to these air carriers who are also engaged in domestic air transportation.[31] The "chosen instrument" policy, though thus rejected, survived as an issue and has received extensive consideration, but without success in the Congress. No bill to establish the "chosen instrument", of which there were several which were pressed vigorously, has ever passed the Congress; and thus, though repeatedly offered the opportunity, Congress has not changed the carefully developed national air policy referred to above under which our post-war international air transportation system has been developed.[32]

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[31] TWA has 30,119 international route miles authorized, Braniff has 7,870 such miles, Northwest has 14,984, and Delta has 3,270. Pan American's total authorized mileage is 155,858 (Civil Aeronautics Board, Official Airline Route and Mileage Manual, Part II-International and Overseas Section).

[32] See, e.g., Hearings Before the Subcommittee on Aviation of the Committee on Commerce, United States Senate, 79th Congress, 1st Session, on S. 326; Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives, 80th Congress, 1st Session, on Bills Relative to Overseas Air Transportation; Hearings Before a Subcommittee of the Com-

The national air policy, loaded with considerations of national interest affecting our world-wide relationships, has thus been implemented. The achievement of one of the principal objectives of the Act—i.e., to develop an air transportation system adequate to meet the national needs—has been accomplished in the foreign field by the President (with the advice of the Board and, on the "chosen instrument" issue, with the advice of all departments and agencies interested in the national air transportation system). The decision of the majority of the court below jeopardizes that achievement; and if permitted to stand, threatens to reverse the unanimous decision on the "chosen instrument" issue.

b. The decision of the court will jeopardize the national air policy.

As the Board has put it, in speaking of carriers engaged in both domestic and international operations, (1) the domestic segment is the more "robust", and the international segment is the "economically weaker", part of the air transport industry (R. 54); and (2) ". . . the percentage of subsidy to total mail payments is substantially greater for the international air carriers as a group than for the domestic air carriers."[33] The Board has commented re-

mittee on Interstate and Foreign Commerce, United States Senate, 80th Congress, 1st Session, on S. 987.

The volume of services has grown. In the fiscal year ending June 30, 1940, a pre-War year, Pan American, then alone in this new international field carried 175,000 persons, 98,300,000 passenger miles (CAB Annual Report, 1940, p. 43). In the 12 months ending December 31, 1952, United States air carriers in their international and overseas services carried 2,877,000 passengers, 2,087,000,000 passenger miles. Of this amount, Pan American alone carried 1,412,000 persons, 1,779,000,000 passenger miles (C.A.B. Recurrent Report of Mileage and Traffic Data).

[33] Civil Aeronautics Board, Administrative Separation of Subsidy from Total Mail Payments to United States International, Overseas, and Territorial Air Carriers, June 1952, p. 3. Thus for the current fiscal year ending June 30, 1954, the Board estimates that TWA, Braniff, Northwest, and Delta, will receive in their domestic operations $9,974,000. of service mail pay and $500,000. of subsidy (constituting 4.7% of the total), whereas with respect

cently concerning the effect of offsetting domestic earnings against international "need" as follows:

> "It is against the background of this carefully and deliberately developed policy of long standing that the impact of the offset proposal must be weighed. So viewed, we believe that to follow a policy of offset can only invite serious consequences far outweighing any short term advantages the proposal may appear to have. Indeed, while it may be true that application of the offset proposal in this proceeding may reduce the immediate subsidy bill to the Government, in the long run increased subsidies are likely to result rather than savings. In the first place, Delta, as well as the other carriers similarly situated, may well be induced to withdraw from international operations. At present, no U. S. international carrier is able to operate without subsidy[24] and this condition may prevail during the forseeable future. In contrast, the domestic services of many of the carriers operating internationally have reached the point where they require no subsidy. Included in this category is Delta, here involved, which is in a position to produce adequate earnings on its domestic division, without Government subsidy. Faced with a policy which would drain such earnings from its domestic division, which it has developed to a stage of self-sufficiency, it is not unlikely that Delta as well as other carriers would be reluctant to continue international service.
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> "Delta's domestic competitors who do not operate international services are in a position to utilize domestic earnings to improve their service, add new equipment, and engage in promotional activities, while with an offset policy Delta's earnings would be utilized to support its international service. Its domestic competitive position, under such circumstances would cer-

to the international operations of these air carriers they will receive $5,629,000. of service mail pay and $12,727,000. of subsidy (constituting 69% of the total) Civil Aeronautics Board, Administrative Separation of Subsidy from Total Mail Payments to United States Air Carriers, September, 1953 Revision, Appendix 4 and 9. For Pan American's international operations the estimate for the same year is $10,995,000. of service mail pay and $28,667,000. of subsidy (constituting 72% of the total) (Ibid, Appendix 9).

tainly deteriorate with the result that the carrier would either seek to withdraw from international operations or would reach a state where its domestic service would again require subsidy.

"Nor would carriers in a position to effect mergers which would otherwise decrease the subsidy bill[25] be expected to press for such consolidations. A graphic example is Western Airlines, a domestic carrier operating under a subsidy free mail rate, which has indicated that it is no longer interested in a possible merger with Pacific Northern Airlines, a Territorial carrier having an estimated annual subsidy need for its States Alaska service of $777,000, if an offset principle is to be applied.

"Assuming that Delta should follow the course we have indicated following adoption of an offset principle, and be permitted to abandon its international service, a replacement would have to be found either in the form of a new carrier or an existing carrier operating in the same area. The first alternative would tend to increase the subsidy bill since the savings inherent in a single established organization operating two divisions would not be present. Parenthetically, it may be pointed out that no question of offsetting domestic earnings could arise in these circumstances. Likewise, the experience and know-how of an established carrier would be lacking. On the other hand, to replace the service with an existing carrier would inevitably tend to limit all American flag service to one carrier in conflict with the policy of competition which has been so laboriously evolved. Clearly the reversal of so well-established a policy should not be done indirectly through a mail rate proceeding not subject to Presidential review and approval."[34]

"[24] Except "stub-end" services such as those operated by American and National which are not truly international services as we are discussing them here.

"[25] The subsidy bill to the Government for the domestic services of C&S is estimated to have been reduced by $539,000 annually as a result of the Delta/C&S merger."

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[34] *Delta Air Lines, Inc., Mail Rates, Latin American Operations, Statement of Tentative Findings and Conclusions*, C.A.B. Order No. E-7738, September 21, 1953 at pp. 11-13.

Thus, Petitioner submits that the Act should be construed by this Court so that where the Board has established the domestic and international operations as separate rate-making divisions, domestic earnings will not be siphoned into the international division, and thereby avoid jeopardizing the continued operation of our national air policy which has been established and implemented with Presidential approval in order to achieve one of the major objectives of the Act.[34a]

3. The financial stability of air carriers, one of the principal objectives of the Act, would be impaired by unduly delaying the finality of earnings.

The Declaration of Policy of the Act[35] states that the Board should regulate in such manner as to "foster sound economic conditions" in air transportation; and that competition is to be invoked to the extent necessary to assure the sound development of the air transportation system. Section 406 of the Act should be construed to speed, not retard, the realization and continued maintenance of this objective. The legislative history of the Act makes it clear

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[34a] International air services must be performed willingly and aggressively if the objectives of the Act are to be realized. One of the standards which the Board must find that the applicant for a route meets is that it should be "willing". Section 401(d) of the Act, 52 Stat. 987, 49 U.S.C. 481(d)(1). If, as the Board points out in the statement of its views quoted immediately above, a carrier engaged in both domestic and substantial international operations is handicapped in its efforts to compete domestically with carriers engaged exclusively in domestic service by a principle requiring the domestic to support the more costly international service, it certainly will cease to be "willing" in the aggressive development and expansion of the volume of its international operations. The action of the President in deciding that the carrier should perform a service for the nation in international service will be undermined. In this connection, it should be noted that the Act, in recognition of the special circumstances under which foreign air transportation is conducted, omitted that class of service in providing that "It shall be the duty of each air carrier to provide . . . adequate service . . ." Section 404(a) of the Act, 52 Stat. 993, 49 U.S.C. 484(a).

[35] *Infra*, Appendix.

that one of the chief aims in its enactment was to provide financial stability in the air transportation industry.[35a]

One phase of this prime objective of the Act is the development of the air transport industry to a point where it will be financially self-sufficient, i.e., free from dependence upon subsidy (R. 19). It seems apparent without argument that becoming free from dependence upon subsidy is one of the greatest of all forward steps toward "sound economic conditions". For the fiscal years ending June 30, 1954, and June 30, 1955, the Board estimates that all of the ten major trunk air carriers (with one exception to a comparatively minor extent) will be conducting domestic operations on a basis entirely free from subsidy.[36] These carriers are American, Eastern, TWA, and United, constituting Group I on a 45 cents per ton mile service mail rate, (this being a common rate for this class of carriers) and Braniff, Capital, Delta, National, Northwest, and Western, constituting Group II on a 53 cents per ton mile serv-

[35a] "The result of this chaotic situation of the air carriers has been to shake the faith of the investing public in their financial stability and to prevent the flow of funds into the industry. Col. Edgar S. Gorrell, president of the Air Transport Association, representing substantially all of the scheduled American-flag air lines, testified before your committee during the public hearing on H.R. 9738 that $120,000,000 of private capital has been invested in the present air-transport system and that 50 percent of this investment has been lost . . ." H.R. Rep. No. 2254, p. 2, 75th Cong. 3d Sess. (1930) on H.R. 9738 which was substantially similar to S. 3845 which became the Civil Aeronautics Act of 1938. Congressman Lea, who managed the Civil Aeronautics Act on the floor of the House also stated: "We want to give financial stability to these companies so they can finance their operations and finance them to advantage." 83 Cong. Rec. 8500, 75th Cong., 3rd Sess., May 7, 1938.

[36] Civil Aeronautics Board, Administrative Separation of Subsidy from Total Mail Payments to United States Air Carriers, September, 1953 Revision, Appendix 4 and Appendix 5. The one exception is Braniff, which has certain less remunerative local service operations included; but action has now been proposed by the Board which would eliminate all subsidy domestically from the mail rate to be fixed for Braniff's domestic operations for the current period. *Braniff Final Mail Rate Case*, C.A.B. Order No. E-7815, Tentative Decision, October 13, 1953. The Postmaster General has filed Exceptions and a Brief in support thereof.

ice mail rate (this being a common rate for this class).[37] Thus TWA, Braniff, Northwest, and Delta, the four domestic air carriers who are engaged in substantial international services, have domestically (in which they perform the much larger portion of their business) achieved this enviable goal of self-sufficiency.[38]

The construction of the statute contended for by the Postmaster General would, as shown in earlier portions of this brief, make any domestic division rates of Braniff, Delta, Northwest, and TWA, essentially and substantively temporary in nature until the final rates are fixed in the international division, in some cases years later;[39] for if system-wide "need" must be determined whenever final rates are fixed, as the court below held, then the results of operating under a domestic division rate are tentative until the loss suffered or the profit realized therein is reflected in the subsidy granted or withheld in the final international division rate. Thus, the stability implied from the Board's above-mentioned subsidy free classification of these four carriers, 83% of whose business is domestic, loses much, if not all, of its meaning; the stability dependent upon the apparent self-sufficient status of domestic operations achieved by Braniff, Delta, Northwest and TWA becomes illusory; and no confidence could be placed thereon. Great confusion as to where the carrier stands financially would result. It will not be fostering "sound economic conditions" if the Board is forced to follow this course.[39a]

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[37] Ibid. As to Braniff, note the exception mentioned in the next preceding footnote.

[38] In 1952, 83% of the volume of the principal air service performed by these four Companies occurred in their domestic divisions. C.A.B. Recurrent Report of Mileage and Traffic Data.

[39] Thus, e.g., TWA commenced international operations on February 5, 1946. Final mail rates in its international division for the intervening period have not yet been fixed.

[39a] ". . . If the Board could redetermine rates for a past period when the carrier has made less than an adequate profit, or no profit at all, it could do so when the carrier has made more than an adequate profit. The statute makes no differentiation. The financial confusion which would follow from the lat-

The importance which the Board has attributed to sound economic conditions has been so great as to have caused it to refrain from the recapture of earnings realized during the pendency of a mail rate proceeding, even though admittedly excessive earnings were realized during the period;[40] and in this connection the Board has stressed the adverse effects of such a policy of recapture on managerial incentive to accomplish increased economies in operation, the question mark which it would write upon all of the air carrier's financial statements, and the consequent impairment of its ability to raise capital.[41]

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ter conclusion seems obvious. No rate order would be final. No dividend declaration would be secure. No large commitment would be conclusively feasible. No offering of securities would have a firm foundation. We find no indication that Congress meant to create so great uncertainty." *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board*, 169 F. 2d 893, 896 (D. C. Cir. 1948) *aff'd*, 336 U. S. 601 (1949).

[40] The Board has held that it has the power to reduce mail rates back to the date of the institution of the rate proceeding. *American Airlines, Inc.—Mail Rate Proceeding*, 3 C.A.B. 323, 325-333 (1942). However, the Board has repeatedly refused to recapture earnings realized between the time of the institution of the rate proceeding and the date of decision. *Pan American-Grace Airways, Inc.—Mail Rates* 3 C.A.B. 550, 565 (1942); *Eastern Air Lines, Inc., Mail Rate Proceeding*, 3 C.A.B. 733, 742-743 (1942); *American Airlines Inc., Mail Rate Proceeding*, 3 C.A.B. 770, 776 (1942).

[41] In the *Pan American-Grace Airways, Inc., Mail Rate Case*, cited in the footnote above, after discussing various considerations adverse to recapture (including some growing out of World War II), the Board stated, at p. 565, with respect to the possible recapture of past earnings, though within the rate proceeding period:

> ". . . It would in all likelihood reduce managerial incentive to accomplish increased economies in operation. Management could hardly be expected to exert itself energetically to such purpose with the ever-present fear, however unfounded it might be, that money saved through increased economies would be taken away. It must be granted, too, that such a policy writes a question mark across the carrier's financial statements which purport to reflect its true financial condition; for such statements, upon which investors may have relied, may subsequently be rendered misleading by a retroactive order of the Board. To the extent that such incidents create uncertainty as to the carrier's financial position they tend to impair its ability to attract capital, and a program of debt financing on terms unfavorable to the carrier would inevitably result."

In the case of C&S the disturbing effect to economic conditions would be particularly acute by the substantive recapture which the decision below requires. The entire air transport industry, the financial world, and all concerned relied upon the Board's announced policies favoring final mail rates and fostering of sound economic conditions. Not until 1951 was it ever conceived by anyone that C&S's 1948 domestic rates were other than final, as would be the case if the Postmaster General's success in the court below is permitted to stand. No financial stability, no accurate credit rating, no stable balance sheet position, no dividend policy, and no ability to raise private capital can struggle through such uncertainties as are piled up by the decision of the court below.

4. It would be impossible for air carriers engaged in both domestic and international air services to compete effectively with air carriers engaged exclusively in domestic services with the result that the domestic public interest would suffer and one of the principal objectives of the Act would be defeated.

Domestic air carriers operating international routes compete in their domestic services with air carriers engaged exclusively in domestic services.

As has been pointed out above, international air services are economically weaker than domestic air services.

As a result, the air carriers engaged in both types of services would be subjected, under the decision of the court below, to a constant draining off of their domestic earnings for the financial support of their international services. On the other hand, the domestic earnings of carriers engaged exclusively in domestic air services are not subject to that diversion.

Under such circumstances the air carriers operating both types of service could not maintain the same level of domestic earnings as their domestic competitors, and, therefore,

necessarily would compete at a great disadvantage. This condition would jeopardize important public interest objectives with respect to domestic air service which are within the purposes of the Act.

This point can be made clear by a simple example. Petitioner today competes extensively with Eastern Airlines. If Petitioner's profits on the more lucrative domestic routes (upon which it now has a service mail rate) are to be drained off to support the less profitable international routes, then Petitioner is at a severe competitive disadvantage. Eastern, without such a drain on its profits, will have a large body of earnings which it can direct towards securing public support on the routes over which it is competitive with Petitioner by securing larger, faster, and more attractive equipment, by more extensive advertising, by more frequent schedules, and, indeed, possibly by lower passenger and cargo rates.

The increasing public acceptance of air transport in recent years has made it possible for the Board to place a substantial number of domestic air carriers on uniform service mail rates for domestic services without including any element of the subsidy payments. As indicated above, ten of the thirteen domestic trunk-line air carriers, including Petitioner, are now receiving only service mail payments. With this elimination of subsidy, flowing from adequate domestic commercial earnings, further improvements in the amount and stability of domestic earnings can open the way for reductions in domestic passenger and cargo rates, increases in the volume of air-coach services, and other benefits to the public.

But it is axiomatic that domestic passenger and cargo rates must, for competitive reasons, be substantially the same as between carriers. Consequently, the level of domestic earnings of those carriers operating both domestic and international services, depleted by the offset required by the decision of the court below, would provide a higher floor to domestic passenger and cargo rates than would

otherwise be the case—unless the Board should abandon its policy of uniform service mail rates for such carriers. Either of these alternatives would be contrary to the general public interest objectives of the Act.

D. CONTRARY TO THE POSTMASTER GENERAL'S ASSERTIONS, ADOPTED BY THE COURT BELOW, THE BOARD'S PRIOR ADMINISTRATION OF THE ACT DOES NOT SUPPORT THE CONTENTION THAT IT MUST, AS A MATTER OF LAW, APPLY EARNINGS REALIZED UNDER A FINAL AND UNCHALLENGED MAIL RATE IN ONE DIVISION IN REDUCTION OF NEED DETERMINED FOR ANOTHER DIVISION IN A SUBSEQUENT PROCEEDING.

The court below in seeking the proper construction of Section 406(b) of the Act as applied to this case relied upon what it considered to be the "established construction of the Act by the Board which should be given weight." (R. 72) In support of this conclusion it noted that the Board in the past has stated that the "need" referred to in Section 406(b) of the Act is that "of the air carrier as a whole" and that the air carrier is the "primary unit around which the national air transportation system was to be developed through the instrumentality of air mail compensation." *Chicago & Southern Air Lines, Inc.—Mail Rates for Route Nos. 8 and 53*, 3 C.A.B. 161, 190 (1941). (R. 72) It further noted that this principle was reaffirmed in *Pan American Airways, Inc., Alaska Mail Rates*, 6 C.A.B. 61, 67 (1944). (R. 72).

The court below was in error in relying upon these cases as an established construction of Section 406(b) insofar as they might furnish any precedent for this proceeding. On the contrary, the Board's decision in this case that it was not required, as a matter of law, to make the offset requested by the Postmaster General, is in complete accord with its prior administrative practice.

A reading of the 1941 *C&S Case* makes it clear that the Board was there undertaking to establish the entire system of the carrier as the base upon which to determine mail

payments. Within this framework the legal question was posed of "whether the Board may make allowance for the conduct of a passenger and property operation on which no mail is carried in fixing the rates for the transportation of mail over the carrier's system." 3 C.A.B. 161, 187. The Board concluded that it was precluded "from confining its consideration of the carrier's need to that manifested on a segment of its system upon which mail is carried to the exclusion of its need on particular certificated segments of its system serving commerce and the national defense alone." 3 C.A.B. 161, 190. The language which it used, quoted by the court below, was intended to support the conclusion that, within the framework of a system-wide rate-making unit, all operations of a carrier, including its non-mail operations found required by one or more purposes of the Act, should be taken into consideration because such non-mail operations formed part of the system.

Obviously, therefore, there was no question in the 1941 *C&S Case* involving an effort to establish a division. The case is not in point.[43]

The court below also relied upon *Pan American Airways, Inc., Alaska Mail Rates*, 6 C.A.B. 61 (1944), wherein the Board denied subsidy mail pay on Pan American's Alaska division because of excess earnings from its Latin American division. But the language of the Board in that case must be read in the light of the *sui generis* problem before the Board and its findings in the earlier first opinion in the *Pan American Airways, Inc., Latin American Mail Rates Case*, 3 C.A.B. 657 (1942). In the latter case the Board had instituted a proceeding in 1939 looking to the establishment of mail rates for Pan American, thereby creating an "open" mail rate period. The *Latin American Mail Rates Case* was, after being reopened, ultimately decided simultaneously with the *Alaska Mail Rates Case* in

[43] The other cases relied upon in the Postmaster General's brief to the court below, p. 11, except for the Pan American division cases, discussed below, are distinguishable from the instant proceeding upon the same grounds.

1944.[44] Thus, until 1944 both the Latin American and the Alaskan mail rates were "open" so that instead of recapturing, as it could have, in the *Latin American Mail Rates Case* the "excessive" earnings realized by Pan American during the pendency of that proceeding and then awarding "need" mail compensation for the Alaska division in the *Alaska Mail Rates Case* the Board did the much simpler act of equalizing the situation by leaving both divisions where they were. This is an entirely different situation from Petitioner's case where the Postmaster General wants the Board to "offset" earnings realized in one of C&S's divisions during a *closed* period in which the rate was final and unchallenged against mail pay requirements determined for another division in a subsequent proceeding some three years later! Furthermore, there is another significant distinction. In the *Latin American Mail Rates Case* the Board, after finding and declaring the amount of the "excess" earned during the pendency of that proceeding stated that while it would not recapture the same by retroactively lowering the rate during the pendency of the proceeding, such "excess" earnings should be placed in a special reserve account; and the Board stated that it intended to take such "excess" earnings into account in determining "need" thereafter for other divisions of the carrier. Thus, in lieu of recapture, something analogous to a trust fund was created and notice was given to the carrier that the fund would be applied as indicated. This certainly distinguishes the case from Petitioner's case. If the *Latin American Mail Rates Case* had been closed, as was Petitioner's 1948 domestic rate case, during the period in which the earnings in question had been accumulated, the Board would have had no power to recapture through the device of a "trust fund" for later application elsewhere.

Petitioner therefore submits that the court below was in error in relying upon the 1941 *C&S Case* and the 1944

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[44] The *Latin American Rate Case* was subsequently reopened to revise the amount of "excess" earnings because certain amounts had been erroneously omitted in determining the investment upon which a rate of return was allowed in the original opinion.

Pan American Alaska Mail Rates Case as an "established construction of the Act by the Board" governing this proceeding, as has been developed above. Petitioner furthermore submits that for the Board to have ruled under the facts of this case, as the Postmaster General urged, that the "need" referred to in Section 406(b) is the need of the carrier as a whole, and, therefore, the Board *must* offset a portion of the earnings realized under the final and unchallenged domestic mail rate against the "need" determined for the international division, would have been contrary to its prior administrative practice.

First, it would have been contrary to its holding in *Pan American-Grace Airways, Mail Rates*, 3 C.A.B. 550, 561 (1942) that it could, in the exercise of its discretion, refuse to recapture excess earnings *even* though they were realized during an "open" period.

Second, it would have been contrary to its unvarying policy to classify international and domestic operations into two separate rate-making divisions where the international air transportation operations are of substantial proportion.[45] In doing so the Board has stated that "we believe the foreign and overseas operation should stand on its own feet for mail-pay purposes".[46] Such a statement

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[45] e.g. *Transcontinental & Western Air, Inc., Mail Rates*, 6 C.A.B. 595 (1945); *Transcontinental & Western Air, Inc., Transatlantic Mail Rate*, 7 C.A.B. 421 (1946); *Braniff Airways, Inc., Mail Rates*, 8 C.A.B. 971 (1947); *Colonial Airlines, Inc., Bermuda Rates*, 9 C.A.B. 20 (1948); *Braniff Airways, Inc., Mail Rates*, 9 C.A.B. 607 (1948); *Chicago & Southern Airlines, Inc., Mail Rates*, 9 C.A.B. 786 (1948); *Northwest Airlines, Inc., Mail Rates*, 10 C.A.B. 1 (1949); *Transcontinental & Western Air, Inc., Mail Rates*, 10 C.A.B. 803 (1949); *Braniff Airways, Inc., Mail Rates*, 11 C.A.B. 431 (1950); *Northwest Airlines, Inc., Trans-Pacific Mail Rates*, 12 C.A.B. 256 (1950); *Colonial Airlines, Inc., Bermuda Mail Rates*, 12 C.A.B. 737 (1951).

[46] *Northwest Airlines, Inc., Trans-Pacific Mail Rates*, 12 C.A.B. 256, 257 (1950). See, also, *Pennsylvania Central Airline Corporation, et al., Motions*, 8 C.A.B. 685, 703 (1947), where the Board noted that in the order fixing TWA's domestic rate it had "specifically provided that the rate was not to apply to the international operation, for which we subsequently, in a separate proceeding, fixed a temporary rate. This has the effect of a determination that TWA's domestic and international operations are *separate units for rate-making purposes* . . ." (Emphasis supplied)

of policy, made prior to the decision in this case, is obviously contradictory to any alleged administrative practice which would mean that the Board *must* consider the "need" of international and domestic operations as a whole in such a manner as to require an "offset" of earnings under the domestic division against the "need" of the international division. In this proceeding,[47] and in subsequent proceedings,[48] the Board has spelled out even more carefully its view that the accomplishment of the objectives of the Act, can, in a case where domestic carriers have substantial international operations, only be achieved by separate mail rate divisions where each will "stand on its own feet."

Finally, it is obvious that there was direct precedent in the Board's administrative practice, upheld by this Court,[49] which would have contradicted any holding that the Board was *required* to apply any portion of earnings realized under a *final* and *unchallenged* mail rate against "need" determined in a subsequent proceeding. The Board has already expressed opposition to any construction of the Act which would further the incentive-destroying cost-plus system of rate-making,[50] and repeated this observation as grounds for its decision in this case. (R. 19-20)

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[47] See Statement, pp. 4-5, *supra*.

[48] *National Airlines, Inc., Statement of Tentative Findings and Conclusions*, CAB Order No. E-6344, April 21, 1952, pp. 2-3; *Delta Air Lines, Inc., Mail Rates, Latin American Operations, Statement of Provisional Findings and Conclusions*, E-7738, September 21, 1953, pp. 7-15 (see excerpts quoted at pp. 35-36, *supra*); *Braniff Final Mail Rate Case*, Tentative Decision CAB Order No. E-7815, October 13, 1953, pp. 4-9, particularly p. 5 where the Board said "... the furtherance of the basic objectives of the Act, including the development of economically sound domestic and international air transportation systems and the avoidance of monopolistic control of United States international air transportation, requires the treatment of Braniff's international and domestic divisions as separate rate-making units."

[49] *Pennsylvania Central Airlines Corp., et al., Motions*, 8 C.A.B. 685 (1947); aff'd. *sub nom Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board*, 336 U.S. 601 (1949).

[50] See excerpt from the Board's decision in the *Pennsylvania Central Airlines Case, supra*, n. 24.

Under these circumstances Petitioner submits that the court below was in error when it asserted that there was an established construction of the Act by the Board which would stand as any precedent to support the position of the Postmaster General in this proceeding. The contrary is the case. Prior administrative practice naturally led to the Board's rejection of the Postmaster General's demand that the Board was required, as a matter of law, to make the "offset" he requested. This administrative practice, geared, as it is, to the achievement of important objectives of the Act, should be accorded great weight by this Court in construing Section 406(b).

II. IF, CONTRARY TO THE CONTENTIONS OF PETITIONER, SECTION 406(b) OF THE ACT REQUIRES THE BOARD, IN FIXING MAIL RATES FOR A RATE-MAKING DIVISION, TO "TAKE INTO CONSIDERATION . . . THE NEED . . ." OF THE CARRIER AS A WHOLE, THEN THE BOARD'S ACTION SHOULD BE UPHELD AS A VALID EXERCISE OF ITS DISCRETIONARY AUTHORITY.

Introduction. In the preceding portion of this Brief the Petitioner has argued that the Board lacks the power to take the action which the Postmaster General has requested. If this Court does not agree, however, then Petitioner argues, alternatively, that the Board's decision should be upheld as a valid exercise of the discretionary authority delegated to it by Congress under Section 406(b) of the Act when, after taking into consideration the "need" of the air carrier as a whole, it concluded, for reasons of public interest, which are within the objectives of the Act, that the mail rates for the international division should be fixed without any offset to reflect in such rates any part of the domestic earnings.

Before presenting this argument (in Section B below) it is necessary to discuss the question of whether there is a body of "excessive" earnings in the domestic division, as the Postmaster General contends. This must be done because it is only within the framework of an understanding

of what the Board actually did in the proceeding below that it can be determined whether the Board properly exercised its discretionary authority. In Section A below, therefore, Petitioner analyzes this matter and argues that there is not now, and never has been, a specific body of earnings which the Board has determined to be "excessive" over what the carrier "needed" for its domestic system. Much of the error which Petitioner claims was committed by the court below can be attributed to the assumption that there is such a body of legally determined "excess" earnings,[51] and to a misconstruction of the manner in which the Board below exercised the authority delegated to it by Congress in Section 406(b) of the Act.

A. At no time was there any finding by the Board in the domestic division of C&S that the carrier's "need" was limited to a return of 7.4%; or that any earnings, under the sliding-scale future mail rates therein fixed, would be excessive; and, therefore, there is no automatically determinable "corpus" of "excess" earnings as the court below assumed.

As shown in the Statement,[52] the Board in 1948 fixed "need" mail rates in the domestic division of C&S to operate from January 1, 1948, forward. The Board did not find just one rate fair and reasonable. It found that, subject to the inevitably changing circumstances of the future, and with a particular view toward providing the management of C&S with incentive itself to change for the better certain of those circumstances (such as load factors and cost levels), a "sliding-scale incentive mail rate formula"[53] should be established. The Board said that this:

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[51] It is to be noted that there was no necessity to discuss the nature of the earnings on the domestic division (which the Postmaster General claims were "excessive") in Part I, above. This was true because, regardless of whether or not a portion of the domestic earnings realized had been legally declared "excessive", Petitioner claims in Part I that the Board lacked the power to deal with them in the international division proceeding.

[52] *Supra*, pp. 5-8.

[53] 9 C. A. B. 786, 810-812.

> ". . . sliding-scale incentive mail rate formula . . . will fix a mail rate which will be *reasonable* in terms of an attainable passenger load factor and will decline with increases in the passenger load factor at a rate designed to allow a progressive increase in the profit earned by C&S." (Emphasis supplied.)[54]

The Board's Appendix 12 to its opinion sets forth 27 airplane mile rates at 1 percent interval changes in the passenger load factors ranging from 55% to 81%,[55] and in the Board's Order, it stated:

> "It is Ordered, That the fair and reasonable rates of compensation to be paid Chicago and Southern Air Lines, Inc. . . . are hereby fixed, determined, and published to be as follows:
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> ". . . For each month during which the average passenger load factor . . . does not exceed 56.99 percent, a base rate of 34 cents per airplane mile; for each month during which the average passenger load factor exceeds 56.99 percent, a base rate per airplane mile which shall be less than 34 cents by 1.05 cents per airplane mile for each 1 percent, or fraction thereof, by which the average passenger load factor exceeds 56.99 percent, provided that in no event shall the base rate per airplane mile be less than 8.5 cents; . . ." [56]

Thus, the Board did not find just *one* mail rate fair and reasonable; it found an infinite number of rates derived from the formula between the stated maximum and minimum ceiling and floor to be *fair and reasonable.* No action by the Board in the domestic proceeding ever changed this finding.

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[54] 9 C. A. B. 786, 811.

[55] 9 C. A. B. 786, 826.

[56] *Ibid,* at 786-787. There was a change reflected in the base rate to take effect on and after the carrier extended its international services beyond Havana, Cuba (due to adjustments in allocations between foreign and domestic costs and investment) but no change in the formula. The Board's Order placed these rates in effect. 9 C. A. B. 786-787.

As shown in the Statement,[57] the rate of return on investment was estimated by the Board to be 3.6% at a 55% load factor, 7.3% at a 60% load factor, and 13.1% at a 70% load factor. C&S had estimated a load factor of 60.09% for the future.[58] Admittedly, such an estimate could not be infallible. The Board accepted it; and then stated:

> ". . . We have adapted this load factor to a sliding-scale mail rate formula which permits the mail rate to vary inversely with changes in the passenger load factor and thus compensate to a substantial extent for any errors in the forecast of load factors."[59]

Actual earnings for the 1948-1950 period in question in domestic operations, reflecting commercial revenues and compensation under these mail rates as reported to the Board amounted to a 12.5% return on domestic investment (R. 19, 53).[60] The Postmaster General seizes upon the difference between a 7.4% return which, under the 1948 estimates would have been earned under static conditions at the C&S forecast load factor, and the resulting actuality of a 12.5% return (such difference being approximately $654,000.) and labeled it "excess" earnings. He has erred in his construction of the facts. As shown by the Board's Order quoted above, the infinite number of rates between the ceiling and the floor established were found to be fair

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57 *Supra*, n. 5.

58 This, under the formula and estimates, would have produced a 7.4% return.

59 9 C. A. B. 786, 805-806.

60 Actually, the improved showing was achieved through economies effected (specifically encouraged and hoped for by the Board—*supra*, n. 5, last paragraph) through accounting adjustments not represented by dollar income—and through the sale of equipment as shown by a stipulation filed with the Board. (R. 65) (See, also, p. 3, n. 1, in the brief of the Board to the court below). This stipulation, reporting operating net profit and investment of the domestic division for the 1948-1950 period, did not have any bearing upon the question of what was in excess of "need" because, under the Act, only the Board can determine "need".

and reasonable. The amount actually earned was within those limits.[61]

There is absolutely no basis for giving this amount of $654,000, composed in a substantial part of accounting adjustments (R. 65), any status as "excess", or "excessive", or as having any legal significance as being outside the range of rates fixed by the Board to be fair and reasonable—because it is not.[62]

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61 The Postmaster General stated in his brief to the court below (p. 9):

> ". . . In the instant case the Board awarded domestic 'need' subsidy which it estimated would yield a return after taxes for the years 1948-1950 of 7.4% on property allocable to domestic operations. In fixing foreign subsidy pay, it gave the carrier a 7% rate of return after taxes for those years. Thus the Board in effect found that C&S 'needed' a 7.4% return on domestic and a 7% return on foreign operations."

As indicated above in the text, there is no such finding by the Board.

62 The Board has recently so stated specifically. C&S was merged into Petitioner on May 1, 1953. This necessitated a new rate proceeding for the international division. In the proceeding in that matter, although as a result of the merger all subsidy requirements have been eliminated in the domestic division, the Postmaster General is contending that all estimated earnings over what will produce some minimum rate of return on domestic investment should be used to finance the estimated international future "need" of the merged carrier in the international division. In commenting upon the relationship of the decision of the court below to that problem, the Board, referring to the fact that the court below had reversed the Board and held that it "had erred in not offsetting the 'excess' earnings generated by the domestic division against the need of the international division in fixing mail rates for the latter operation", stated in a footnote:

> "The term 'excess' earnings or profits, as that term was used in the Board's opinion in the *Chicago and Southern* case, in the opinion of the Court of Appeals, and here, refers only to earnings in excess of a stated rate of return on investment. The Board had no occasion to determine in the *Chicago and Southern* case, and the Board does not determine here, how much, if any, of these 'excess' earnings should be considered as excessive in the sense that these earnings are available for or should be offset against the mail rate for the international division, since in both the *Chicago and Southern* case and in this case the Board's decisions rest upon a policy determination to treat the domestic and international divisions as entirely separate for rate-making purposes, including the fixing of final class rates applicable to more than one corporate air carrier. A determination that earnings are excessive in this latter sense obviously requires more than a mere subtraction of actual or estimated profits from

B. The Board in the proceeding below did "take into consideration" the "need" of the air carrier as a whole and its decision was a valid exercise of its discretionary authority.

The Postmaster General's contention is that in fixing rates for the international division of C&S in 1951, the "need" of the carrier as a whole must be taken into consideration. The court below appears to have adopted his contention (R. 71).[63]

If the Act is to be construed as requiring this, the decision of the Board in the proceeding below fully complies with the requirement.

In its Statement of Tentative Findings and Conclusions adopted May 18, 1951, in the proceeding before the Board (R. 6-50), the Board expressly referred to the existence and amount of the domestic earnings of C&S (R. 19). It then discussed at length in the Statement the relationship of those earnings to the international rates which should be fixed for C&S in the light of public interest factors which the Board analyzed and felt were pertinent to a determina-

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an estimated rate of return on investment. *See, e. g.*, our opinion in the *General Fare Investigation Case*, Order No. E-7376, May 14, 1953."

Delta Air Lines, Inc., Mail Rates, Latin American Operations, Statement of Provisional Findings and Conclusions, CAB Order No. E-7738, adopted September 21, 1953, p. 6, mimeographed copy, n. 10.

As noted above, there is no legal basis for saying that there was any earnings in "excess" of the "need" of C&S in its domestic division in the 1948-1950 period. However, the court below erroneously thought differently. On the assumption it made, it was easy to take a second step in error and apply such an assumed "excess" in reduction of international division "need". This was particularly easy to do in the light of the way the court below erroneously quoted the statute by making "take into consideration" apply to "all other revenue" rather than to "need" as the statute reads (see *supra*, n. 12).

[63] However, the effect of the decision of the court below is to deny the Board's power to determine the carrier's "need". The court directs that $654,000 of the domestic earnings are to be regarded as in excess of the carrier's domestic "need" for the 1948-1950 period. This is an unauthorized invasion by the court of a question committed by the Act to the Board's discretion. In considering the "need" of the carrier as a whole in fixing rates in 1951, the Board clearly is authorized to make an overall determination of the actual "need", as it appeared in 1951.

tion of the relationship of the domestic earnings to the rate to be fixed for the international services (R. 19-20).

In its subsequent final opinion and order fixing the international division mail rates, the Board reviewed again the relationship of the actual domestic earnings to the international rates to be fixed and the considerations of public interest involved in the alternative methods of treating such earnings in fixing C&S's international division rates (R. 53-55).

The Board's extensive consideration of the domestic earnings of C&S in the international rate proceeding below coupled with its consideration of the C&S international division clearly was a consideration of the "need" of C&S as a whole.

In its opinions in the proceeding below, the Board made detailed findings with respect to the factors of public interest which it found to be pertinent to the determination of the relationship of the domestic earnings to the international rates to be fixed. It concluded that to determine that domestic earnings should be used to sustain international operations would have serious consequences, undesirable from the point of view of the public interest (R. 55). Specifically the Board expressly considered the treatment of the domestic earnings in the light of the following factors: (1) That the international services are almost invariably weaker than domestic services and the offset would, therefore, economically burden the domestic operations (R. 54); (2) that if the domestic air system can be kept financially sound, the public must ultimately benefit (R. 54); (3) that if the carriers' domestic earnings position continues strong, reductions in the domestic fare level will be possible (R. 54); (4) that with improved domestic earnings, carriers operating domestic services should be able to benefit the public and themselves with more modern aircraft and with improved methods affording safer and more efficient operations (R. 54); (5) that to allow international operations "to be carried on the back of domestic opera-

tions," would subject the latter to "an unjustifiable strain" (R. 54); (6) that it was desirable to maintain the comparable status between domestic operators which have foreign routes as against those which do not have foreign routes, in order to permit the fixing of uniform domestic mail rates for groups of carriers and thus create conditions more favorable to efficient operations (R. 54-55); and (7) that the offset principle would establish an undesirable "cost-plus" system of rate-making for C&S and other carriers operating both types of service (R. 19-21).

The Board concluded as a result of this consideration that the domestic earnings should not be "offset" in fixing the international rates and it fixed such rates on the basis of such consideration and that conclusion (R. 55, 58-59).[64]

The statutory directive in Section 406(b) against which the above consideration by the Board must be measured is not a narrow, mechanical one: but is a directive that the Board shall "take into consideration . . . the need" of the air carrier for compensation sufficient to enable it "to maintain and continue the development of air transportation" in accordance with the statutory objectives. The implementation of such a Congressional mandate is not something which can be done by any rigid formula or with mathematical precision. On the contrary, the very scope of the directive indicates clearly that by Section 406(b) the Congress intended to give the Board the broad measure of discretion necessary to bring into play in the determination of "need" and the fixing of mail rates all considerations of

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[64] In its final opinion below the Board expressly said that it was "not deciding the question of our legal power to make such an offset" (R. 55). In view of this, since, after reviewing in the opinion the facts with respect to C&S's earnings and needs the Board decided that C&S should retain the domestic earnings, it takes such earnings into consideration in the sense that the existence and effect of such earnings was a part of the process of decision. The conclusion is inescapable that the Board decided that C&S needed its actual domestic earnings. Had the Board decided otherwise it would have been necessary for the Board to decide the question of its legal power to make the offset.

public interest which the Board should find to be in furtherance of the statutory objectives.

The soundness of this approach to the meaning of Section 406(b) is clearly confirmed by the general breadth of the discretionary authority given to the Board by the Act as a whole. Any effort to limit the wide sweep of discretion reposed by Congress in the Board when, in the determination of mail pay, the Board is authorized to "take into consideration" the "need" of the air carrier "sufficient . . . to enable", among other things, the maintenance and continuance of the development objectives of the Act, is utterly inconsistent with the entire scheme of the Act.[65]

To begin with, Congress has set forth in Section 2 of the Act basic purposes thereof which it has required that the Board "shall consider" in "the exercise and performance of its powers and duties under this Act" which would include, of course, the duty to fix mail rates under Section 406 of the Act.[66]

An analysis of other broad grants of authority to the Board by Congress points up the broad area of judgment and discretion which it must exercise. Thus Congress gave the Board power over the establishment of routes,[67] passenger and property fares and rates in domestic air trans-

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[65] The basic nature of rate-making under any statute involves a broad ambit of discretionary authority on the part of the rate-making agency. As this Court said in *Board of Trade* v. *United States*, 314 U.S 534, 546 (1942):

> "The process of rate-making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems."

[66] The Court of Appeals for the District of Columbia Circuit has noted that the provisions included in Section 2 under the title of "Declaration of Policy" are "peremptory" and "are as much an enactment by the Congress as is any other section of the statute." *American Airlines, Inc.* v. *Civil Aeronautics Board*, 192 F. 2nd 417, 420 (D. C. Cir. 1951).

[67] Sec. 401 and 416 (b), 49 U. S. C. 481, 496 (b), domestic routes. As to international routes, see *supra*, n. 28.

portation,[68] mergers, consolidations, and acquisitions of control,[69] interlocking relationships,[70] power to dispense with the operations of the "antitrust laws" [71] and the responsibility to provide financial assistance where necessary to maintain and continue the development of air transportation through "need" mail rates.[72] The Board even has the power to grant exemptions under certain circumstances from the provisions of the economic regulation Title of the Act.[73]

The vast scope and magnitude of the discretionary power intended to be conferred by the Congress thus emerges. Under Section 2 of the Act, the Board must, in connection with exercising its power to set mail rates, among other factors, consider the "encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense." This is not a simple assignment. It is one for expert judgment by the Board and requires consideration not only of the effect of any proposed action upon the individual carrier or carriers concerned, but the effect upon other carriers and upon the public.[74]

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[68] Sec. 1002 (d), 49 U. S. C. 642 (d).

[69] Sec. 408, 49 U. S. C. 488.

[70] Sec. 409, 49 U. S. C. 489.

[71] Sec. 414, 49 U. S. C. 494.

[72] Sec. 406, *infra*, Appendix.

[73] Sec. 416 (b), 49 U. S. C. 496 (b).

[74] In the second to last paragraph of the opinion of the court below, it notes its decision in *Summerfield, Postmaster General, et al.* v. *Civil Aeronautics Board*, Nos. 11259 and 11324 in which, in an opinion by Judge Prettyman, it held that profits derived by Western Air Lines, Inc. from the sale of an air route certificate with operating equipment cannot be excluded from revenue for the purpose of providing an industry incentive. The Court then states that "we see no essential difference between that case and this." (R. 72)

It is not clear whether the court below was thereby intending to incorporate by reference as one of the grounds for its decision in this case its holding in the *Western Case* that the Board cannot, in determining mail rates, con-

It would be completely inconsistent with the broad ambit of discretionary power delegated to the Board by Congress in the Act, as well as with the broad discretionary language of Section 406(b) itself, to conclude that the consideration given to the "need" of C&S by the Board in its decision below was not a lawful and appropriate discharge of its responsibility to "take into consideration" the "need" of C&S for mail compensation sufficient to enable it "to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

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sider the development of air transportation generally but must focus upon the development of the single carrier or carriers before it in an individual proceeding. Judge Prettyman, who wrote the opinion in the *Western Case*, stated in his dissent in this case that he did not find the problem of the *Western Case* in the present case." (R. 73-74). Petitioner submits that Judge Prettyman was right for, as indicated above, many of the findings upon which the Board based its decision relating to the "need" of C&S were findings directly affecting C&S alone. Petitioner also submits, however, that the holding in the *Western Case* is in error. Broad questions of national air transportation policy and their effect upon the public obviously must be considered in the determination of mail rates if the objectives of the Act are to be achieved. Reference to the Declaration of Policy in Section 2 of the Act indicates that Congress never had a "keyhole" approach under which elements entering into the "need" of a carrier "to maintain and continue the development of air transportation" could fail to encompass the entire air transportation system of the nation. Such a narrow view has surely never been held in the rate-making tradition where the effect of a proposed rate upon the public interest has always been an element in rate making. *Baltimore & Ohio R. Co.* v. *United States*, 345 U. S. 146, 150 (1953); *King* v. *United States*, 344 U. S. 254, 263, 264 (1952).

CONCLUSION.

For the foregoing reasons, it is respectfully urged that the judgment of the court below should be reversed, and the orders of the Board of which review is sought, affirmed.

Respectfully submitted,

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APPENDIX

The pertinent provisions of the Civil Aeronautics Act of 1938[1], as amended, are as follows:

DECLARATION OF POLICY

SEC. 2. In the exercise and performance of its powers and duties under this Act, the [Board] shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil areonautics.

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[1] Act of June 23, 1938, c. 601, 52 Stat. 977, as amended, 49 U.S.C. 401, et seq.; Reorg. Plan No. IV, Sec. 7, effective June 30, 1940, 5 F.R. 2421.

RATES FOR TRANSPORTATION OF MAIL

Authority to Fix Rates

SEC. 406 (a) The [Board] is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

Rate-Making Elements

(b) In fixing and determining fair and reasonable rates of compensation under this section, the [Board], considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the [Board] shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation [7] of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such

[7] So in original.

air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.